

No. 8

Nyagsi Engineers Ltd. - Complainant

Vs.

Regional Entity Tender Committee/Regional Coordinating Council (Northern Region)
- Respondent

Tender:

Petition by Complainant – Nyagsi Engineers Ltd. dated 12th October 2009, for administrative review against the refusal of the Northern Regional Co-ordinating Council (NRCC) and the Northern Regional Entity Tender Committee (NRETC) to award the contract for construction of a Steel Bridge over River Katapila on the Wenchiki-Adibo Feeder Road.

Brief Facts:

The brief facts are that the Complainant participated in the tender for Lot No. 100 for the construction of a steel bridge over the Katapila river on the Wenchiki-Adibo Feeder Road in the Northern Region, under the Ghana/Dutch Bridges Programme for Feeder Roads (*Project No. DFR/DUTCH/NR/2008*).

The applicable Evaluation Report on the tender recommended the award of Lot 100 to the Complainant, which recommendation was duly approved by the Northern Regional Tender Review Board (NRTRB) for implementation.

The award and concurrent approval of the NTRB was however not communicated to the Complainant contrary to Section 65(1) of the Public Procurement Act, 2003 (Act 663). This is done by the Procurement Entity as the Regional Tender Review Board only approves the Evaluation Report and recommendations therein. Instead of conveying the NTRB's approval to the Department of Feeder Roads, the NRETC by letter no. NRCC/RPCU/RETC/VOL 4/36 of 26th August 2009, wrote to the Regional Director, Department of Feeder Roads (copied to the Complainant) informing him of 'cancellation of the award' to Complainant for non-performance on similar projects awarded to it in the Region and other parts of the country.

The Complainant protested to the Chairman of the ETC (of the NRCC), challenging the purported cancellation, among others.

In response, the NRCC affirmed that it was the entire tender (for that Lot) which had been cancelled and not simply the award, citing Clause 31.1 of the applicable Instruction to Tenderers (ITT) by which the employer reserves the right to accept, reject or cancel any tenders at any time prior to the award of contract, without incurring any liability to the affected Tenderer(s) or obligation to explain the grounds thereof.

The NRCC cited Complainant's non-performance of projects in the Northern and Western Regions to stand by its purported cancellation of tender. The Complainant petitioned the PPA for administrative review and a decision in its favour.

The PPA duly suspended the Lot 100 procurement process, pending administrative review of the case.

Issue(s):

Issues considered by the Authority were:-

1. Whether or not a contract for the construction of a steel bridge aforementioned (Lot 100/DFR/DUTCH/NR/2008) was rightly awarded to the Complainant.
2. Whether or not the Northern Regional Entity Tender Committee had the mandate to cancel an award made after due acceptance of the Evaluation Report and concurrent approval by the Northern Regional Tender Review Board.
3. Could the Northern Regional Entity Tender Committee rightly decide not to make an award as approved by the Regional Tender Review Board?

Findings:

Following detailed review of supporting documents submitted by both Parties, the Authority found as follows:-

1. Though the Evaluation Panel, properly convened by the Department of Feeder Roads (*'the Procurement Entity'* within the meaning of the Public Procurement Act, 2003 (Act 663)) recommended an award in favour of the Complainant, which recommendation duly received concurrent approval from the Northern Regional Tender Review Board, the award was not communicated as required under Act 663 and/or the PPA Manual.
2. It was the Department of Feeder Roads (the procurement entity) and not the NRETC or the NRCC which had the mandate to implement the Evaluation Report and the Tender Review Board's concurrent approval.
3. Consequently, the NRCC/NRETC did not have the mandate to cancel the award or tender, nor to issue instructions for repackaging and re-advertisement of the Project as it purported to do per letter No. NRCC/RPCU/VOL 4/36 dated 26th August 2009. Schedule 1 of the Public Procurement Act, 2003 (Act 663) clearly specifies the functions of ETCs of Procurement Entities.
4. The NRCC's allegations of non-performance by the Complainant were not sufficiently substantiated. Issues arising post-evaluation which were not specified as award or qualification criteria in the tender documents advertised, cannot be used against a winning tenderer post-evaluation. In accordance with procurement best practices, criteria cannot be introduced during or after evaluation to disqualify a tenderer, if such criteria was not pre-disclosed in the tender documents.
5. From the foregoing, the NRCC/NRETC's letter of cancellation and instructions for re-tendering referenced NRCC/RPCU/VOL 4/36 of 26th August 2009 is declared void and of no legal effect. Failure to specify grounds for rejection *in the tender documents or request for proposals* violated Section 29(1) of Act 663.

6. The Evaluation Report duly received concurrent approval from the Northern Regional Tender Review Board. The Northern Regional Co-ordinating Council per its RETC, however, was not the institution entitled to invoke Clause 31.1 of the applicable Instruction to Tenderers (ITT). By this clause the Employer (DFR) reserves the right to accept, reject or cancel any tenders at any time *prior to the award* of contract, without incurring any liability to the affected Tenderer(s) or obligation to explain the grounds thereof. In any case, reliance on Section 29(1) of Act 663 to reject tenders requires compliance with the proviso imposed on the Employer to *pre-disclose the grounds for rejection in tender documents or request for proposals*. This was not done.
7. The Department of Feeder Road's request for the Northern Regional Co-ordinating Council to receive tenders on their behalf does not in any way make the NRCC responsible for the procurement process. The Department of Feeder Roads remains the Entity responsible for the project.
8. Accordingly it is hereby ordered that the concurrent approval be referred to the Procurement Entity for implementation.